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Lycurgan, Inc.

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

11 LYCURGAN, INC. d/b/a ARES
12 ARMOR, Plaintiff,
13 v.
14 B. TODD JONES, in his official
15 capacity as Head of the San
Diego Bureau of Alcohol,
16 Tobacco, Firearms and
Explosives; and DOES 1-10,
Defendants.

CASE NO. 14-CV-1679 JLS (BGS)

LYCURGAN, INC.'S REPLY IN
SUPPORT OF EMERGENCY
APPLICATION FOR AN ORDER FOR
EXPEDITED RULE 34 INSPECTION
AND TO CONTINUE HEARING DATE
AND RELATED FILING DEADLINES.

Judge: Hon. Janis L. Sammartino
Dept.: 4A
Date: November 6, 2014
Time: 1:30 P M

1. “Facial” or “Factual,” what is the Challenge under 12(b)(1)?

21 The Government challenges Lycurgan’s effort to obtain discovery to meet
22 the burden imposed by the Government’s 12(b)(1) motion suggesting that the
23 Government’s motion to dismiss raised “a purely legal issue and is the only issue
24 raised by Defendant’s motion to dismiss.” [Oppo. at 2.]

25 // /
26 // /
27 // /

1 Indeed, the Government claims that the

2 “... discussion about EP80s in Defendant’s Points and Authorities
3 appears in the “Statement of Facts” and was provided as background
4 information.[See id. at 2-4.] The only issue discussed in the
5 “Argument” section of Defendant’s Points and Authorities is
6 whether CAFRA provides a jurisdictional basis to seek the return of
7 evidence seized pursuant to a criminal search warrant. [See id. at
8 4-5.]”

9 [Oppo., pg. 2, fn. 3., Doc. 9]

10 But, if that is the case – then why did the Government include the
11 declarations of two special agents, Agent Marks and Agent McCracken, in
12 support of the motion? Those declarations were clearly not provided as
13 “background information” because unless there is a “crime” there is no seizure for
14 “non-forfeiture purposes.” [See Motion, p. 4.]

15 It is not illegal to sell chunks of polymer material. Unless those chunks of
16 polymer material comprise a “firearm” under Federal law. Thereby, the
17 Government’s effort to establish that the chunks of polymer material are firearms
18 goes directly to the issues implicated in the 12(b)(1) motion.

19 Indeed, both of those ATF personnel described in sensational terms that the
20 subject unfinished lower receivers were not just “firearms” but those used to
21 make a version of an “M-16 machine gun.” [Marks Dec., ¶ 6, Doc 7-2.]

22 Rather than a “facial” challenge to subject matter jurisdiction, the
23 Government has made a “factual” challenge. This distinction was explained
24 yesterday by District Judge O’Neill in the Eastern District of California:

25 “Federal Rule of Civil Procedure 12(b)(1) provides for
26 dismissal of an action for "lack of subject-matter jurisdiction." Faced
27 with a Rule 12(b)(1) motion, a plaintiff bears the burden of proving
28 the existence of the court's subject matter jurisdiction. *Thompson v.
McCombe*, 99 F.3d 352, 353 (9th Cir. 1996). A federal court is
 presumed to lack jurisdiction in a particular case unless the contrary

affirmatively appears. *Gen. Atomic Co. v. United Nuclear Corp.*, 655 F.2d 968, 968-69 (9th Cir. 1981). A challenge to subject matter jurisdiction may be facial or factual. *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). As explained in *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1038 (9th Cir. 2004):In a facial attack, the challenger asserts that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction. By contrast, in a factual attack, the challenger disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction.

A Rule 12(b)(1) motion can be made as a speaking motion—or factual attack—when the defendant submits evidence challenging the jurisdiction along with its motion to dismiss. *Thornhill Publ'g Co. v. Gen. Tel. & Elecs. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979); see *Savage*, 343 F.3d at 1039-40 & n. 2. A proper speaking motion allows the court to consider evidence outside the complaint without converting the motion into a summary judgment motion. See *Safe Air*, 373 F.3d at 1039. "Once the moving party has converted the motion to dismiss into a factual motion by presenting affidavits or other evidence properly brought before the court, the party opposing the motion must furnish affidavits or other evidence necessary to satisfy its burden of establishing subject matter jurisdiction." *Savage*, 343 F.3d at 1039-40, n. 2. In a speaking motion, "[t]he court need not presume the truthfulness of the plaintiff's allegations." *Safe Air*, 373 F.3d at 1039.

Travelers Indem. Co. v. Centex Homes, 2014 U.S. Dist. LEXIS 146456, 2-4 (E.D. Cal. Oct. 14, 2014)

1 The Government made the effort to take the “factual” route with its
2 12(b)(1) motion. Thus, the rule expressed in *Laub v. United States Dept. of*
3 *Interior* applies and Plaintiff should be entitled to its discovery. See, *Laub v.*
4 *United States Dept. of Interior* (9th Cir. 2003) 342 F3d 1080, 1093.

II. The Government is not prejudiced by providing the Technical Bulletin according to a protective order

7 || The Government states:

8 “The specific document that Plaintiff seeks, ATF Technical Bulletin
9 14-01, is a law enforcement sensitive document that should be the
10 subject of a protective order before it is produced.”

11 || [Oppo to Application, pg. 2, fn. 2]

Very well. Lycurgan will execute an interim protective order restricting access to Technical Bulletin 14-01 to Lycurgan's counsel and retired ATF Agent Daniel O'Kelly. As Mr. O'Kelly has worked most of his career in law enforcement, and in particular with the ATF – the security of the Technical Bulletin as divulged to undersigned and Mr. O'Kelly should not alarm the ATF.

17 || III. Conclusion

18 For the foregoing reasons, Plaintiff Lycurgan Inc. requests that the ATF
19 respond to the Request for Production of Documents in a shortened manner such
20 that Lycurgan's expert may review the technical bulletin prior to the date set for
21 responding to the Defendant's motion under 12(b)(1).

Respectfully submitted,

The McMillan Law Firm, APC

/s/ Scott A. McMillan

Scott A. McMillan
Attorneys for Plaintiff
Lycurgan, Inc.

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